No. 96-1424

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARISOL A., by her next friend,
Rev. Dr. James Alexander Forbes, Jr., *et al.*,

Petitioners,

—v.—

RUDOLPH W. GIULIANI, as Mayor
of the City of New York, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

Of Counsel:

Thomas F. Curnin
Landis C. Best
Serina M. Vash
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

Karen Freedman
Gayle Lerner
LAWYERS FOR CHILDREN, INC.
110 Lafayette Street
New York, New York 10013
(212) 966-6420

Marcia Robinson Lowry
Counsel of Record
Craig Levine
CHILDREN'S RIGHTS, INC.
404 Park Avenue South
New York, New York 10016
(212) 683-2210

Attorneys for Petitioners

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REPLY BRIEF OF PETITIONERS

In an attempt to obscure what is clearly a matter for this Court's plenary review, Respondents' Brief in Opposition misstates the facts and issue presented, and relies upon a strained interpretation of the law.[1] However, Respondents cannot avoid the jurisdictional import of the question Petitioners have placed before this Court, the resolution of which will serve both to cure a significant split among the circuits and to give effect to the statute and implementing federal rules governing interlocutory appeals.

The core of Respondents' Brief in Opposition consists of two inaccurate contentions: (i) that no split exists among the circuits regarding whether an interlocutory order may be recertified for the sole purpose of permitting an otherwise time-barred appeal; and (ii) that the issue before this Court is not one of jurisdiction but of discretion.[2] Both propositions are refuted by Justice Stevens' dissenting opinion in *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) (*per curiam*), and the Second Circuit opinion now before this Court (104 F.3d 524; App. 1a-12a).

Respondents' Brief in Opposition consistently strays from the question that lies at the heart of this petition, namely whether district courts in fact have the power to recertify (that is, to certify for a second time) an interlocutory order solely

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[1] Citations to "App. __" refer to the Appendix to the Petition for Writ of Certiorari. The Petition itself is hereinafter referred to as "the Petition" or "Petition". References to Respondents' Brief in Opposition are herein cited as "Br. Opp."

[2] Respondents' discussion of the "so ordered" stipulation permitting State Defendants to join in the City's interlocutory appeal is a red-herring. (Br. Opp. at 4n.) *Prior* to the expiration of the initial 10-day certification period (August 5, 1996), the parties stipulated that the State could join in the City's interlocutory appeal *nunc pro tunc* and that the 10-day period would not be "extended by virtue of [the] stipulation." (App. 30a.) The court "so ordered" *that* agreement. (App. 30a-31a.)

to cure a would-be appellant's failure to comply with a jurisdictional time limitation. Respondents instead argue that the proper question is whether the district court abused its discretion in recertifying the order for immediate appeal. If this is a proper inquiry at all, it is a secondary one—never reached if the district court lacks the power, as Petitioners argue, in the first instance, to recertify an order for interlocutory appeal.

By recertifying its order for interlocutory appeal, the district court rendered meaningless the 10-day jurisdictional time limitation established by both statute and the federal rules. Without this Court's guidance, the law will remain in a state of confusion and this jurisdictional time limitation will remain without effect.

THE REASONS FOR GRANTING THE WRIT ARE UNDERSCORED BY RESPONDENTS' MISSTATEMENT OF THE ISSUE AND THEIR STRAINED READING OF THE APPLICABLE LAW.

A. The Circuits Are Divided.

Unable to overcome the import of the issue raised by this Petition, Respondents insist (in the face of considerable authority to the contrary) that the circuits are not divided on the issue before this Court. (Br. Opp. at 8.) However, the split among the circuits regarding whether a district court can recertify an interlocutory order for immediate appeal for the sole purpose of extending the time for appeal was squarely recognized by Justice Stevens in his *Baldwin County* dissent. 466 U.S. at 161 (Stevens, J., dissenting). Citing the very cases Petitioners contend establish the circuit split, Justice Stevens acknowledged that "[t]here is a conflict in the Circuits on this jurisdictional question. . . ." *Baldwin County*, 466 U.S. at 161-62 (Stevens, J., dissenting). The Second Circuit likewise recognized the conflict among the circuits on this question when it undertook to explain its holding "[i]n light of varying

approaches in other circuits to the jurisdictional issues raised by [Petitioners]. . . ." (104 F.3d at 525; App. 3a.)[3] Indeed, the Second Circuit's opinion surveys the tripartite split among the circuits on the recertification issue, expressly choosing to follow the approach advocated by the Ninth Circuit. (104 F.3d at 527-28; App. 7a-10a.) Respondents' insistence that "there is no split among the circuit courts of appeals on this issue" (Br. Opp. at 8) is flatly incorrect.

Respondents' reading of the majority opinion in *Baldwin County* virtually begs this Court for guidance on the issue of recertification. Despite the Second Circuit's explicit recognition that the Supreme Court has never "squarely addressed the issue of whether a circuit court has jurisdiction to consider a § 1292(b) petition in this situation"[4] (104 F.3d at 527; App. 6a), Respondents repeatedly argue that this Court's decision in *Baldwin County* definitively established that a district court has the power to recertify an interlocutory order for immediate appeal.[5] Respondents fail to acknowledge that the

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[3] In further recognition of the existing circuit split the Second Circuit stated that, in his dissent in *Baldwin County*, "Justice Stevens (joined by Justices Brennan and Marshall) noted a circuit split on the jurisdictional issue. . . ." (104 F.3d at 527; App 7a.)

[4] The Second Circuit's opinion makes clear that the court does not view *Baldwin County* as determinative of the recertification issue. As the Second Circuit stated:

> "The [*Baldwin*] majority reached the merits of the appeal without even mentioning [the recertification issue]. . . . Although defendants cite *Baldwin* as implicit support for the district court's power to recertify an order, the issue bears further exploration in view of the majority's silence on the issue." (104 F.3d at 527; App 7a.)

The Second Circuit is not alone, as seen by other post-*Baldwin County* decisions. *See Myles* v. *Laffitte*, 881 F.2d 125, 126 n.2 (4th Cir. 1989) ("[i]t is not clear . . . whether a district court may in effect enlarge the time for appealing from a certified order by vacating and reentering or amending an order of certification so as arguably to commence the running anew of the 10 day period."); *see also Benny* v. *England* (*In re Benny*), 812 F.2d 1133 (9th Cir. 1987) (not referencing *Baldwin County*).

[5] *See* Br. Opp. at 8, 12, 14.

Baldwin County majority never addressed the issue of recertification or that Justice Stevens' opinion therein is a dissent.[6] *See* 466 U.S. at 152 (Stevens, J., dissenting). Moreover, as noted in the Petition for Writ of Certiorari (Petition at 12 n.14), this Court's majority opinion in *Baldwin County*—holding that a 90-day filing time limit should be strictly enforced—supports *Petitioners'* point herein. *See Baldwin County*, 466 U.S. at 152 ("[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts . . . ."). Respondents read far more into *Baldwin County* than it can support.

Despite Respondents' attempt to cast the *Baldwin County* majority's silence as determinative of the recertification issue, this Court has repeatedly held that the majority's silence on an issue cannot be interpreted as tacitly resolving an issue not addressed in its opinion. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to

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[6] At the August 8, 1996 district court hearing at which they orally sought recertification without having filed any papers or provided any notice, Respondents misleadingly asserted, as they do throughout their Brief in Opposition, that this Court resolved the question of whether district courts may recertify interlocutory orders for immediate appeal for the sole purpose of curing a failure to timely petition the circuit court for appeal in *Baldwin County*. (App. 26a.) Respondents also contend that Petitioners should have raised this jurisdictional issue earlier. It is axiomatic, however, that jurisdictional questions are not subject to waiver and indeed that courts have an obligation to review jurisdictional questions *sua sponte*. *See Baldwin County*, 466 U.S. at 162 (Stevens, J., dissenting); *see also Bender* v. *Williamsport Area School District*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review' " (citation omitted)); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979) ("even if not raised by the parties, we cannot ignore the absence of federal jurisdiction"); *United States* v. *Griffin*, 303 U.S. 226, 229 (1938) ("lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties").

constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925); *accord United States* v. *Shabani*, 513 U.S. 10, 16 (1994). This tenet applies equally to jurisdictional questions.[7]

As Petitioners demonstrate, and as the Second Circuit recognized, the issue of whether a district court can recertify an interlocutory order for immediate appeal for the sole purpose of permitting an otherwise time-barred interlocutory appeal remains unsettled by this Court. As set forth in detail in the Petition, lack of definitive guidance from this Court has led to confusion and conflict among the circuit courts, now underscored by Respondents' strained reading of *Baldwin County*. Petitioners respectfully urge the Court to speak to this important jurisdictional issue.

B. Whether The District Court Can Recertify An Interlocutory Order For Immediate Appeal Is A Threshold Jurisdictional Issue.

At the core of Respondents' Brief in Opposition is the contention that "the question at issue is not one of jurisdiction, but of abuse of discretion." (Br. Opp. at 10-11.) However, in the very case Respondents claim is dispositive here, Justice Stevens concisely and accurately set forth the issue Petitioners place before the Court:

> The *jurisdictional* question in this case is whether the 10-day time limitation imposed by § 1292(b) and Federal Rule of Appellate Procedure 5(a), a time period which may not be enlarged, Fed. Rule App. Pro. 26(b), can be

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[7] As this Court stated in *Hagans* v. *Lavine*, 415 U.S. 528, 534 n.5 (1974):

> "[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."; *see also United States* v. *More*, 3 Cranch 159, 172 (1805) (Marshall, C.J.) ("No question was made, in that case, as to the jurisdiction. It passed sub silentio, and the court does not consider itself bound by that case.").

> circumvented by simply reentering the interlocutory order for the sole purpose of extending the time for filing the petition. 466 U.S. at 161 (Stevens, J., dissenting) (emphasis added).

The Second Circuit likewise recognized the threshold, jurisdictional nature of this issue, stating that:

> The basic question raised by the motion was whether a district court *has the power to recertify* under § 1292(b) the order appealed from to enable the party opposing such order to file with this court a timely petition for leave to appeal. (104 F.3d at 525-26; App. 3a) (emphasis added).

Although Petitioners respectfully dispute their conclusions, Justice Stevens and the Second Circuit accurately framed the jurisdictional issue now before this Court. Respondents' attempt to divert attention from the cert-worthiness of this Petition by touting this as an issue of discretion, rather than jurisdiction (Br. Opp. at 10-11), is refuted by both Justice Stevens' *Baldwin County* dissent and the Second Circuit's opinion now before this Court.[8]

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[8] That the Second Circuit considers the issue jurisdictional was recently reiterated. Upon learning of this Petition, and without any party having sought a stay of proceedings, the Second Circuit adjourned the scheduled argument of this appeal *sua sponte* pending this Court's resolution of the threshold jurisdictional issue.

It is well-settled, and Respondents here concede, that a party cannot waive an objection to jurisdiction and courts must raise the issue *sua sponte*. *See supra* note 6. Nonetheless, Petitioners in no way waived or "withdrew the objection." (Br. Opp. at 4.) To the contrary Petitioners repeatedly and unequivocally objected. (App. 25a.) Only *after* it became clear that the court was going to grant the extension (at the same hearing in which it was requested without notice or briefing) did Petitioners attempt to mitigate the damage by urging the court to keep discovery moving forward.

Petitioners concede that whether to certify an order for interlocutory review under 28 U.S.C. § 1292(b) is within the discretion of the district court. Logically, therefore, *if* the district court has the power to recertify an interlocutory order for immediate appeal, a decision to exercise that power would also be discretionary. However, as set forth in detail in the Petition for Writ of Certiorari, Petitioners contend that the district court has no such power; that recertification violates the plain meaning of the 10-day time limitations established by both § 1292(b) and Federal Rules of Appellate Procedure 2, 5(a) and 26(b); and that recertification directly conflicts with this Court's recent holding in *Carlisle* v. *United States*, U.S. ___, 116 S. Ct. 1460 (1996).

In support of their contention that this issue is one of discretion, Respondents' opposition confuses three distinct concepts: (1) *amending* an order that does not include requisite certifying language to include that language;[9] (2) *reconsidering* the merits underlying an interlocutory order in the face of new law or facts and issuing a new order;[10] and (3) *recertifying* an order for interlocutory appeal by simply cer-

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[9] While Respondents are correct that under Fed. R. App. P. 5(a) an interlocutory order may be amended "at any time," the plain language of Rule 5(a) permits amendment for only one purpose: "to include the prescribed statement" from 28 U.S.C. § 1292(b). Fed. R. App. P. 5(a). Here, the initial certification order contained the statement required by § 1292(b) (*see* App. 32a-33a), so the provision permitting amendment cannot justify, and is not at all implicated by, the second certification of the same order.

[10] Respondents' Counsel did not seek reconsideration of either the underlying class certification order or the first order certifying the question for interlocutory appeal, but simply asked the district court to "recertify this issue for interlocutory appeal." (App 23a.) Any reference to reconsideration would be wholly inappropriate in this context. Respondents did not request that the court reconsider the merits of the underlying class certification order and (as the prevailing party) are the wrong party to seek reconsideration of the July 26, 1996 certification for interlocutory appeal.

tifying the same order a second time for the sole purpose of granting a would-be appellant an additional 10-day period within which to "timely" file. The clear distinction between reconsideration and recertification has been recognized by several courts in refusing to permit recertification. *See Woods* v. *Baltimore & Ohio R.R.*, 441 F.2d 407, 408 (6th Cir. 1971) (*per curiam*); *Nakhleh* v. *Chemical Construction Corp.*, 366 F. Supp. 1221, 1223 (S.D.N.Y. 1973). Despite Respondents' intepretation of *Woods* (Br. Opp. at 15), the facts in that case, deemed impermissible by the Sixth Circuit, are exactly the same as those here: re-entry of the same certification order by the district court for the sole purpose of permitting an otherwise time-barred petition to the circuit court.

C. This Court's Recent Ruling In *Carlisle* v. *United States* Must Be Given Effect.

In an attempt to distinguish this Court's recent holding in *Carlisle* v. *United States*, 116 S. Ct. 1460 (1996), Respondents assert that "[n]o such similar circumvention or disregard of plain and unambiguous statutory deadlines is at issue here." (Br. Opp. at 17.) However, in his *Baldwin County* dissent Justice Stevens posed the issue as:

> [w]hether the 10-day time limitation imposed by § 1292(b) and Federal Rule of Appellate Procedure 5(a), a time period which may not be enlarged, Fed. Rule App. Proc. 26(b), *can be circumvented* by simply reentering the interlocutory order for the sole purpose of extending the time for filing the petition. 466 U.S. at 161 (Stevens, J., dissenting) (emphasis added).

Justice Stevens concluded that "interlocutory appeals in these instances should be permitted, *notwithstanding the fact that this view essentially renders the 10-day time limitation if not a nullity, essentially within the discretion of a district court to extend at will.*" *Baldwin County*, 466 U.S. at 162 (Stevens, J., dissenting) (emphasis added). Petitioners

respectfully submit that the *Carlisle* Court's holding that district courts lack the power to develop rules that circumvent or conflict with federal rules or constitutional or statutory provisions, *Carlisle*, 116 S. Ct. at 1466, casts serious doubt upon the viability of this conclusion.

The facts of this case are virtually identical to those in *Carlisle*: a plain, unambiguous statutory filing deadline, established both in statute and applicable rules of procedure, was circumvented by the district court. Just as the district court in *Carlisle* could not circumvent the time limits of the Federal Rules of Criminal Procedure, neither may the district court here disregard the 10-day jurisdictional time limit imposed by § 1292(b) and Fed. Rule App. P. 5(a). The statute and implementing federal rules at issue are clear on their face: § 1292(b) expressly requires petitions for appeal to be filed within 10 days, and Fed. R. App. P. 5(a) adds a singular, limited clarification that the 10 days only begin to run after the court has amended its order to include the certifying language. In addition, Fed. R. App. P. 26(b) precludes enlargement of the 10-day period, and Fed. R. App. P. 2 prohibits suspension of this requirement.[11] Respondents' suggestion that nothing prohibits district courts from recertifying an interlocutory order at will for the sole purpose of aiding a dilatory would-be appellant ignores the plain meaning of § 1292(b) and these three federal rules, disregards this Court's holding in *Carlisle*, and renders the jurisdictional 10-day time limitation a nullity.

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[11] Respondents assert that "by analogy, the District Court is expressly authorized under Fed. R. App. P. 4(a)(5) to 'extend the time for filing a notice of appeal' upon timely motion demonstrating 'excusable neglect or good cause.' " (Br. Opp. at 10.) To the contrary the absence of a similar provision in Fed. R. App. P. 5(a) demonstrates that neither excusable neglect nor good cause (neither of which is present here) may extend the time to petition for interlocutory appeal. *See, e.g., United States* v. *Shabani*, 513 U.S. 10, 14 (1994) ("[i]n light of this additional element in the general conspiracy statute [§ 371], Congress' silence in § 846 speaks volumes"); *see also Carlisle*, 116 S. Ct. at 1465.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: New York, New York
April 23, 1997

Respectfully submitted,

Marcia Robinson Lowry
Counsel of Record
Craig Levine
CHILDREN'S RIGHTS, INC.
404 Park Avenue South
New York, New York 10016
(212) 683-2210

Of Counsel:

Thomas F. Curnin
Landis C. Best
Serina M. Vash
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

Karen Freedman
Gayle Lerner
LAWYERS FOR CHILDREN, INC.
110 Lafayette Street
New York, New York 10013
(212) 966-6420

Attorneys for Petitioners